

The Honorable Karen A. Overstreet

Chapter 13

Hearing Date: December 10, 2014

Hearing Time: 9:00 a.m.

Hearing Location: Marysville Municipal Court

1015 State Ave., Courtroom 1

Marysville, WA 98270

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

In re

BANKRUPTCY NO. 14-16771-KAO

JUSTIN SCOTT GUTHRIE,

**BOEING EMPLOYEES CREDIT UNION
OBJECTION TO CONFIRMATION**

Debtor.

Boeing Employees Credit Union ("BECU") objects to confirmation of the debtor's plan, originally filed October 09, 2014 (ECF No. 16) as follows:

I. INTRODUCTION

11 U.S.C. § 109 prohibits Chapter 13 relief unless debtor Justin Guthrie can prove that on the date of the filing of the petition, he had "noncontingent, liquidated, unsecured debts of less than \$383,175." Guthrie is ineligible for Chapter 13 relief because he owes a deficiency balance on a boat loan after the boat was repossessed by BECU of \$584,376.25. This amount is unsecured, noncontingent, and liquidated. Because it exceeds 11 U.S.C. § 109's limit, the plan should be dismissed.

II. FACTS

A. Guthrie agreed to repay BECU \$798,263.38 plus interest in monthly payments for the purchase of a luxury boat.

On July 1, 2007, Guthrie entered into a loan agreement with BECU under account number xxxxxx7245 for the purchase of a 2006 48 foot Sea Ray Sundancer boat, HIN

1 #SERP6832A606, with twin diesel engines. (November 25, 2014 Declaration of Keith
2 Scully (“November 25, 2014 Scully Decl.”) at Ex. A.) The parties executed two separate
3 documents before BECU loaned Guthrie money to purchase a luxury boat. One
4 document, the Promissory Note and Security Agreement (“Promissory Note”), provides
5 the terms of the loan, and mandates that Guthrie must repay the entire balance and that
6 BECU could accelerate payments and demand immediate payment in full if Guthrie
7 defaulted. (November 25, 2014 Scully Decl. at Ex. B.) The Promissory Note provides that
8 “[y]ou unconditionally promise to pay [] the above sum, plus interest on the unpaid
9 balance at the above noted interest rate.” *Id.* at p. 1. It provides that Guthrie is liable for
10 the entire balance “notwithstanding any [] release of security.” *Id.* at p. 2. The preferred
11 marine mortgage secured BECU’s interest in the vessel, but did not establish repayment
12 terms. (November 25, 2014 Scully Decl. at Ex. B.)

13 Each month, Guthrie agreed to pay \$6,546.51. (November 25, 2014 Scully Decl. at
14 Ex. A.) He agreed to an interest rate of 7.740%. *Id.* The Promissory Note established that
15 failure to pay was an event of default, and that BECU could immediately demand all
16 amounts owed by Guthrie when an event of default occurred. *Id.*

17 **B. Guthrie defaulted on the Promissory Note and BECU sold the collateral and**
18 **credited the sale proceeds to the indebtedness.**

19 Guthrie stopped making payments, and BECU repossessed the boat on or about
20 January 12, 2012 after sending Guthrie a notice of repossession. (November 25, 2014
21 Scully Decl. at Ex. A.) Guthrie assisted in the repossession by voluntarily delivering the
22 boat to BECU’s agent, Marine Lenders, and provided the necessary documentation to
23 release his interest in the preferred marine mortgage. (November 25, 2014 Scully Decl. at
24 Ex. A.) BECU used a third party, Marine Lenders, to list the boat for sale to the public.
25 (November 25, 2014 Scully Decl. at Ex. B.) Marine Lenders specializes in selling vessels,
26 and advertises its inventory publicly. (November 25, 2014 Scully Decl. at Ex. B.) Marine
27 Lenders accepted bids from the public and forwarded them to BECU for review.
28 (November 25, 2014 Scully Decl. at Ex. B.) BECU also used Brasher’s NW Auto Auction

1 to see if there was any interest in the boat at wholesale. (November 25, 2014 Scully Decl.
2 at Ex. A.) There was no interest at \$230,000. (*Id.*) BECU considered all offers, and
3 eventually sold the boat for the highest offer, \$350,000, to a third party. (November 25,
4 2014 Scully Decl. at Ex. B.) A public auction was not used because there is no appropriate
5 vessel auction in this area other than Brasher's NW Auto Auction. (November 25, 2014
6 Scully Decl. at Ex. B.) After the sale, BECU sent a letter to Guthrie detailing the sale and
7 reminding him that he was responsible for the deficiency balance. (November 25, 2014
8 Scully Decl. at Ex. B.)

9 BECU did not ever state to Guthrie that BECU would credit any amount other
10 than the commercially reasonable sale value of the vessel to Guthrie's indebtedness, nor
11 did the parties discuss modifying the Promissory Note or otherwise changing the total
12 amount due. (November 25, 2014 Scully Decl. at Ex. B.) After Guthrie released his
13 interest in the vessel, BECU filed a satisfaction of mortgage with the United States Coast
14 Guard because the vessel no longer secured Guthrie's debt and the mortgage was
15 accordingly moot. (*Id.*)

16 **C. BECU accurately accounted for each payment Guthrie made and provided**
17 **Guthrie with the accounting.**

18 BECU kept accurate records of each payment made by Guthrie and the sale
19 proceeds of the vessel. (November 25, 2014 Scully Decl. at Ex. B.) BECU provided
20 Guthrie with a copy of BECU's records when Guthrie requested it. (November 25, 2014
21 Scully Decl. at ¶ 5.) After all appropriate credits and offsets Guthrie owes BECU the
22 principal amount of \$503,872.29 plus interest at the rate of 7.74% through July 10, 2014 in
23 the amount of \$68,127.14. (November 25, 2014 Scully Decl. at Ex. A.)

24 The promissory note also provides for reasonable attorney's fees and costs.
25 (November 25, 2014 Scully Decl. at Ex. A.) BECU has expended \$6,151.50 in pre-filing
26 attorney's fees and costs to date. (*Id.*; (November 25, 2014 Scully Decl. at Ex. C.) Each of
27 those expenses was necessary and reasonable. (November 25, 2014 Scully Decl. at ¶ 6,
28 Ex. C.)

1 **D. BECU moved for summary judgment and Guthrie filed for Chapter 13**
2 **protection.**

3 On August 15, 2014, BECU moved for summary judgment in Snohomish County
4 Superior Court. (November 25, 2014 Scully Decl. at ¶ 7.) On September 4, 2014, Guthrie
5 opposed BECU's motion, and on September 11, 2014, BECU replied. *Id.* Before the
6 matter could be heard by the Superior Court, Guthrie filed for bankruptcy. Guthrie did
7 not disclose the amount of his debt to BECU to this Court.

8 **III. AUTHORITY**

9 **A. Guthrie's plan may not be confirmed if Guthrie owes more than \$383,175 in**
10 **unsecured debt.**

11 Chapter 13 is limited to "[o]nly an individual with regular income that owes, on
12 the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less
13 than \$383,175" 11 U.S.C. § 109(e). A debt is "noncontingent" if all the events giving rise
14 to liability have occurred prior to the filing of the bankruptcy petition. *See, e.g., In re*
15 *Mazzeo*, 131 F.3d 295, 303 (2d Cir.1997); *In re Knight*, 55 F.3d 231, 236 (7th Cir.1995). A
16 debt is "liquidated" if its amount is certain due to agreement of the parties or by
17 operation of law. *United States v. Verdunn*, 89 F.3d 799, 802 (11th Cir.1996). A dispute
18 over the debtor's liability does not make a debt contingent or unliquidated. *see In re*
19 *Mazzeo, supra*, and *Verdunn, supra*. If Guthrie disputes BECU's claim, the Court must
20 determine the amount of unsecured debt. *In re Sylvester*, 19 B.R. 671 (B.A.P. 9th Cir.
21 1982).

22 **B. Guthrie owes BECU \$584,376.25 in noncontingent, liquidated, unsecured**
23 **debt and is therefore ineligible for Chapter 13.**

24 As of the date of filing his petition, Guthrie owed \$578,464.75 plus \$6,151.50 in
25 costs and attorney's fees. (November 25, 2014 Scully Decl. at Ex. A.) The amount owed
26 is unsecured because it is the deficiency between the sale of the boat and the amount of
27 the promissory note. It is noncontingent because all of the events giving rise to liability
28 occurred before Guthrie filed for Chapter 13 protection: he signed the promissory note in
2007 and BECU repossessed and sold the collateral in 2012. (November 25, 2014 Scully
Decl. at Ex. B.) It is liquidated because the amount can be determined by operation of law:

1 the Promissory Note establishes the principal amount and requires payment of interest
2 and costs of collection. Ordinary principles of contract law thus determine the amount
3 due.

4 **C. Guthrie's claim that the amount is uncertain fails.**

5 Guthrie opposed BECU's motion for summary judgment in State court by raising
6 a range of mistaken legal theories. Because there is no opportunity for BECU to respond
7 to Guthrie's reply in support of confirmation, and BECU does not know which if any of
8 these defenses Guthrie may raise, BECU responds to each defense here.

9 **1. The preferred marine mortgage does not prevent BECU from collecting**
10 **the deficiency.**

11 Guthrie claimed that because he had a preferred marine mortgage, he was entitled
12 to a "proper foreclosure" and BECU could not proceed on a deficiency judgment
13 because BECU repossessed the boat rather than suing in federal court to foreclose. But
14 Guthrie is wrong. A preferred marine mortgage under the federal Ship Mortgage Act
15 establishes methods for a marine mortgage holder to protect and enforce their interests in
16 a vessel. 46 U.S.C. § 31325. Specifically, marine mortgage holders may either bring an in
17 rem or in personam action in federal court, or may:

18 [E]nforce the preferred mortgage lien or a claim for the outstanding
19 indebtedness secured by the mortgaged vessel, or both, by exercising any
20 other remedy (including an extrajudicial remedy) against a documented
vessel [].

21 46 U.S.C. § 31325(b)(3). This option allowed BECU to proceed in state court and use any
22 remedy allowed by Washington law to repossess the boat and allows BECU to collect the
23 deficiency now.

24 Guthrie's reliance on 46 U.S.C. § 911 *et seq* and *Nate Leasing Co. v. Wiggins*, 114
25 Wn. 2d 508, 509 (1990) in support of his position that BECU could only have foreclosed
26 in federal court was mistaken. This is superseded law. 46 U.S.C. § 911 has been amended
27 and recodified as 46 U.S.C. §31325 (b); *Nate Leasing* relied on the former statute. *See*
28 *Nate Leasing* 114 Wn.2d at 509; 46 U.S.C. § 31325. 46 U.S.C. § 31325 added an option

1 that allows BECU to proceed in State court “under any other remedy . . . allowed under
2 applicable law.” 46 U.S.C. § 31325(b)(3)(A).

3 **2. Even if Guthrie could cite valid law, he released all interest in the**
4 **marine mortgage.**

5 Even if 46 U.S.C. § 911 had not been amended, Guthrie would still have no claim
6 under the Ship Mortgage Act. The Ship Mortgage Act pertains only to ship mortgages,
7 not any other form of indebtedness. 46 U.S.C. § 31325 (a). Guthrie released all interest in
8 the vessel and BECU filed a satisfaction of mortgage in December, 2011. (November 25,
9 2014 Scully Decl. at Ex. B.)

10 **3. BECU mitigated its damages.**

11 Guthrie claimed that BECU failed to mitigate its damages because BECU sold the
12 boat to a private party. Guthrie relied on RCW 62A.9A-607, which provides that BECU
13 must proceed in a commercially reasonable manner. A “commercially reasonable
14 manner” may include disposition “by public or private proceedings, by one or more
15 contracts, as a unit or in parcels, and at any time and place and on any terms.” RCW
16 62A.9A-610.

17 BECU proceeded in a commercially reasonable manner, and both the sale price
18 and the costs of sale are justified. BECU used the services of a third-party broker, who
19 advertised the vessel to the public and forwarded all bids to BECU. (November 25, 2014
20 Scully Decl. at Ex. B.) BECU also used the services of a public auction, who offered the
21 boat at wholesale to bidders in an advertised auction. (November 25, 2014 Scully Decl. at
22 Ex. B.) When no auction purchaser offered \$230,000 or more, BECU accepted the
23 highest bid—\$350,000—and sold the boat to a private party. (November 25, 2014 Scully
24 Decl. at Ex. A.) The purchase price is commercially reasonable because it is the best price
25 BECU could obtain for the vessel on the open market. (November 25, 2014 Scully Decl.
26 at Ex. B.)

27 Guthrie may also challenge BECU’s deductions from the sale price of the vessel
28 for the costs of storage and sale. But RCW 62A.9A-607 expressly provides that BECU

1 may deduct the costs of enforcement—including commercially reasonable costs of sale—
2 and charge them against Guthrie. And the costs of sale are commercially reasonable
3 because they were incurred in the ordinary course of a sale, and are consistent with
4 market prices for similar services. (November 25, 2014 Scully Decl. at Ex. B.)

5 **4. BECU is not unjustly enriched.**

6 Guthrie argued to the State court that BECU would be unjustly enriched by
7 collecting the deficiency balance. But unjust enrichment occurs when (1) BECU receives
8 a benefit, (2) the received benefit is at Guthrie's expense, and (3) the circumstances make
9 it unjust for BECU to retain the benefit without payment. *W.H. Hughes, Jr., Co. v. Day*,
10 162 Wn. App. 1069 (2011). Guthrie borrowed money and hasn't paid it back. BECU has
11 not received a benefit: it is suffering from a detriment.

12 **5. BECU did not accept the vessel as an accord and satisfaction.**

13 Guthrie claimed that BECU accepted the vessel as an accord and satisfaction,
14 citing RCW 62A.9A-622. But RCW 62A.9A-622 does not address accord and
15 satisfaction. RCW 62A.9A-622 provides:

16 (a) **Effect of acceptance.** A secured party's acceptance of collateral in
17 full or partial satisfaction of the obligation it secures:

18 (1) Discharges the obligation to the extent consented to by the
19 debtor

20 RCW 62A.9A-622. Guthrie claimed—without citing any facts or authority—that this
21 means when he voluntarily gave the boat back to BECU all debts were automatically
22 satisfied. But RCW 62A.9A-622 doesn't say that. Instead, it provides that BECU may
23 accept collateral in *full or partial satisfaction* of the obligation. RCW 62A.9A-622(a).
24 Likewise, to create an accord and satisfaction in law, there must be a meeting of minds of
25 the parties upon the subject and an intention on the part of both to make such an
26 agreement. *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn. 2d 523, 525 (1968).

27 BECU accepted the boat in partial satisfaction of the obligation, and credited the
28 fair market value of the boat to Guthrie's indebtedness. (November 25, 2014 Scully Decl.

1 at Ex. B.) There is no evidence suggesting that the parties intended to modify the
2 Promissory Note or the balance due. The Promissory Note mandates that Guthrie repay
3 the entire principal balance “notwithstanding any release of security.” (November 25,
4 2014 Scully Decl. at Ex. A.) The transfer of ownership Guthrie signed when he
5 voluntarily turned the boat over to BECU indicated that BECU provided no
6 consideration for the transfer. (November 25, 2014 Scully Decl. at Ex. B.) Had BECU
7 credited the entire balance due against the boat, BECU would have so indicated on the
8 transfer of ownership form as consideration to Guthrie. (*Id.*) Further, Guthrie received a
9 notice from BECU after the sale unequivocally stating that:

10 This is to inform you that your vehicle has been sold. Below are the details
11 regarding the sale. You are responsible for any deficiency balance of the loan
12 referenced above.

13 (November 25, 2014 Scully Decl. at Ex. B.)

14 **6. BECU accurately accounted for the funds and did not waive BECU’s**
15 **claim for a judgment on the outstanding balance of the promissory note.**

16 BECU accurately and completely accounted for each payment Guthrie made and
17 for the fair-market sale of the boat once Guthrie voluntarily turned it over. (November 25,
18 2014 Scully Decl. at Ex. B.) BECU’s affidavits supporting the total due are supported by
19 BECU’s records reflecting each payment made by Guthrie and the proceeds of the sale of
20 the vessel. (November 25, 2014 Scully Decl. at Ex. B.)

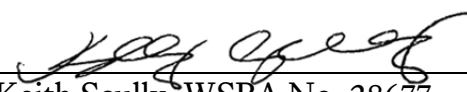
21 **IV. REQUEST**

22 BECU accordingly requests that the Court enter an order denying confirmation of
23 the debtor’s plan, and require that a feasible amended plan be filed no later than 14 days
24 from the date of entry of the order.

25 DATED November 25, 2014.

26 **NEWMAN DU WORS LLP**

27 By:

28 
Keith Scully, WSBA No. 28677
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Additionally, a copy of the foregoing was served on the following parties as indicated below: